

STATE OF MICHIGAN
COURT OF APPEALS

CATHIE McINTOSH,

Plaintiff-Appellant,

v

THE DETROIT NEWS, INC.,

Defendant-Appellee,

and

DETROIT FREE PRESS,

Defendant.

UNPUBLISHED

January 22, 2009

No. 282227

Wayne Circuit Court

LC No. 07-717233-NO

Before: Fort Hood P.J., and Wilder and Borrello, JJ.

PER CURIAM.

Plaintiff Cathie McIntosh appeals as of right an order granting summary disposition to defendant The Detroit News, Inc., under MCR 2.116(C)(10) and dismissing her defamation claim. We affirm.

I. Facts and Procedural History

In January 2006, a staff writer for defendant filed with the Michigan Department of Education (MDE) a Freedom of Information Act¹ request, seeking to receive information about employees in Michigan schools with criminal histories. In her request, the staff writer sought the names and birth dates of all employees in Michigan schools with criminal histories, the criminal convictions of employees in Michigan schools, the school district for which employees with criminal histories were employed, and the job description of employees with criminal convictions. The MDE complied with the writer's request in late June 2006, releasing a 42-page list of individuals with felony convictions working in Michigan schools. The list included information that plaintiff, a bus driver for the Gibraltar School District, had been convicted of felony larceny in a building. On June 29, 2006, an article about convicted felons working in

¹ MCL 15.231 *et seq.*

Michigan schools appeared in defendant's newspaper. The article included the contents of the MDE's list of convicted felons working in Michigan schools and contained the following information about plaintiff:

GIBRALTAR SCHOOL DISTRICT.

Cathie McIntosh, transportation, larceny

On August 11, 2006, plaintiff's attorney wrote a letter to defendant informing defendant that the list of convicted felons employed in Michigan schools erroneously included plaintiff's name and demanded a retraction. The letter stated that plaintiff had not been convicted, but was participating in a diversion program. According to the letter, the felony charge against plaintiff would be "dismissed next January." Enclosed with the letter from plaintiff's counsel was a letter from the Wayne County Prosecutor's Office. The prosecutor's letter explained that although plaintiff had been charged with a non-violent felony, she had entered a probationary diversion program and that upon completion of one year of probation and 60 hours of community service, her case would be dismissed with no conviction and no guilty plea. Despite receiving this information, defendant never printed a retraction. Plaintiff satisfied the conditions of the diversion program, and the felony charge against her was dismissed in January 2007.²

Plaintiff filed a defamation complaint against defendant³ on June 28, 2007. The complaint alleged that plaintiff's name was erroneously included on the MDE's list of convicted felons employed by Michigan schools and that defendant then wrongly published plaintiff's name in a list of convicted felons in its article about convicted felons working in Michigan schools. Plaintiff's complaint acknowledged that she had been charged with a felony, but stated that she had been placed into a diversionary program without adjudication and that the felony charge was ultimately dismissed in January 2007 with no conviction and no guilty plea. According to plaintiff, she requested that defendant print a retraction, but defendant did not do so. Plaintiff sought to recover actual and exemplary damages.

Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that it was privileged under the statutory fair reporting privilege, MCL 600.2911(3), to report the information contained in the MDE's list of convicted felons working in Michigan schools, because its report fairly and accurately reported the actual content of public records. The trial court granted defendant's motion for summary disposition. In so doing, the trial court observed that defendant enjoyed a statutory fair reporting privilege as long as it acted in good faith in reporting the information from the public record. According to the trial court, defendant's failure

² The order dismissing the felony charge against plaintiff is dated January 4, 2006. This date appears to be incorrect. Based on our review of other documents in the lower court record, it appears that the order dismissing the charge was actually entered in January 2007.

³ Plaintiff's complaint also named the Detroit Free Press as a defendant, but the parties stipulated to dismiss the Detroit Free Press on July 18, 2007.

to retract the information did not strip defendant of good faith, and defendant's publication of information regarding plaintiff's status as a convicted felon was substantially true.

II. Standard of Review

The existence of a privilege that immunizes a defendant from liability for libel is a question of law that this Court determines de novo. *Northland Wheels Roller Skating Center, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 324; 539 NW2d 774 (1995).

This Court's review of a trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) is as follows:

This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey, supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). [*Clerc v Chippewa Co War Mem Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005), remanded in part 477 Mich 1067 (2007).]

"Summary disposition is an essential tool in the protection of First Amendment rights." *Kevorkian v American Medical Ass'n*, 237 Mich App 1, 5; 602 NW2d 233 (1999). "When addressing defamation claims, appellate courts must make an independent examination of the record to ensure against forbidden intrusions into the field of free expression." *Id.*

III. Analysis

The statutory fair reporting privilege, MCL 600.2911(3), provides, in relevant part: "Damages shall not be awarded in a libel action for the publication . . . of a fair and true report of matters of public record . . . or record generally available to the public . . ." Thus, the privilege precludes damages in a libel suit where a defendant engages in the publication of the contents of a public record, provided the defendant presents a "fair and true" report of the public record. Furthermore, under the substantial truth doctrine, "[i]f the gist of an article is substantially accurate, then the defendant cannot be liable." *Butcher v SEM Newspapers, Inc*, 190 Mich App 309, 312; 475 NW2d 380 (1991).

It is clear from the language in the statute that the primary question in determining whether the fair reporting privilege applies concerns not the truth of the published statement itself, but whether the statement accurately reports a matter contained in a public record, regardless of the accuracy of the public record. Plaintiff acknowledges that the public record on which defendant's article relied, the MDE's list of Michigan school employees with felony convictions, contained inaccurate information and that the article in defendant's newspaper accurately reflected the public record at the time the article was published. A comparison of the MDE's list of convicted felons working in Michigan's schools and the information about plaintiff in defendant's article reveals that the article was substantially accurate and a true and fair report of the information contained in the MDE's list. Therefore, the trial court properly granted summary disposition in favor of defendant.

Plaintiff contends that any privilege defendant may have had to publish the MDE's list and include the information about plaintiff was qualified, not absolute, and that it expired once plaintiff's counsel notified defendant of the error in the public record. According to plaintiff, upon learning of the error in the public record, defendant was required to publish a retraction, and its failure to do so is evidence of malice and a lack of fairness and neutrality. It is true that the statutory privilege under MCL 600.2911(3) is a qualified privilege. *Koniak v Heritage Newspapers Inc*, 190 Mich App 516, 521; 476 NW2d 447 (1991). Citing *Timmis v Bennett*, 352 Mich 355; 89 NW2d 748 (1958), plaintiff argues that a qualified privilege may be lost if the extent of the publication is excessive. Plaintiff's reliance on *Timmis* is unavailing because the court in *Timmis* did not address the statutory fair reporting privilege under MCL 600.2911(3). Even if *Timmis* did apply to the facts of this case, we find that defendant's publication of the information regarding plaintiff's conviction was not excessive. To the extent that plaintiff argues that defendant's refusal to publish a retraction negated its qualified fair reporting privilege, we decline to address this issue because plaintiff has failed to support her argument with legal authority. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Affirmed.

/s/ Karen M. Fort Hood

/s/ Kurtis T. Wilder

/s/ Stephen L. Borrello